

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

BOSTON CULINARY GROUP INC.¹

Employer

and

Case 4–RC–21072

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 56²

Petitioner

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, Boston Culinary Group Inc., operates restaurant and catering facilities at Bear Creek Mountain Resort in Macungie, Pennsylvania.³ The Employer employs a core group of about 30 to 40 year-round employees and supplements this work force by hiring about 35 to 45 seasonal employees during the winter months. The Petitioner, UFCW Local 56, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer’s year-round full-time and regular part-time employees.⁴ The Employer contends that the seasonal employees should be included in the unit and that the election should be delayed until December 2005 or January 2006, when it next reaches its peak complement of employees. The Petitioner would exclude the seasonal employees as having no reasonable expectation of reemployment and contends that the election should be held as soon as possible.

A Hearing Officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties concerning the issues of whether the seasonal employees should be included in the unit and whether the election should be delayed until the peak season. As discussed below, I have concluded that the seasonal

¹ The Employer’s name was amended at the hearing.

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³ The Employer operates 14 facilities around the country.

⁴ The classifications of the Employer’s employees include: Banquet, Bartender, Busperson, Cashier, Catering, Concessions, Cook, Food, Host, Line Cook, Prep Cook, Runner, Server, Other, and Warehouse employees. The Petitioner would not include Cashiers in the unit because it is an exclusively seasonal classification. The Employer asserts that all of the classifications should be included in the unit.

employees have a reasonable expectation of future employment, and I have therefore directed an election to be delayed until the 2005 – 2006 peak season.

In this Decision, I will first review the factors that must be evaluated in determining whether seasonal employees have a reasonable expectation of future employment and the circumstances under which elections should be delayed to enable seasonal employees to participate. Then, I will present in detail the facts and reasoning that support my conclusions.

I. RELEVANT CASE LAW

In deciding the status of seasonal employees, the Board assesses their reasonable expectation of future employment. Factors which the Board considers include: (1) the size of the area labor force from which the seasonal employees are recruited; (2) the stability of the Employer's labor requirements and the extent to which the Employer is dependent upon seasonal labor; (3) the actual season-to-season reemployment of the seasonal employees; and (4) the Employer's preference or recall policy regarding reemployment of seasonal employees. *Macy's East*, 327 NLRB 73 (1998); *L & B Cooling*, 267 NLRB 1, 2-3 (1983), enfd. 757 F. 2d 236 (10th Cir. 1985); *Maine Apple Growers*, 254 NLRB 501, 502-503 (1981). Where an Employer operates year-round with peak seasons, the Board refers to those employees hired for the peak season as "seasonal employees." See *Baumer Foods*, 190 NLRB 690 (1971).⁵ The Board's policy is that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in the election. *Post Houses, Inc.*, 161 NLRB 1159, 1172-1173 (1966), enfd. 384 F.2d 463 (3rd Cir. 1967); *Sears, Roebuck & Co.*, 112 NLRB 559, 569 fn. 28 (1955).

In determining when to conduct an election where an employer supplements its work force each year with seasonal employees, the Board must balance the goals of ensuring maximum employee participation in the election and permitting current employees to have representation as quickly as possible. *Saltwater, Inc.*, 324 NLRB 343, 344 (1997); *Elsa Canning Co.*, 154 NLRB 1810, 1812 (1965). Generally, postponement of a representation election until the next seasonal peak is only deemed warranted when employment increases by at least 100 percent in the peak season. *Bituma Corp. v. NLRB*, 23 F.3rd 1432, 1435 (8th Cir. 1994); *NLRB v. Broyhill Company*, 528 F.2nd 719, 722 (8th Cir. 1976).

II. FACTS

In November 2003, the Employer began operating the food and beverage operations at a ski resort called Doe Mountain. At the end of the 2003 – 2004 ski season Doe Mountain was

⁵ See also *The Zoological Society of Philadelphia*, Case 4-RC-2025 (2001). In that case, the Employer operated on a year-round basis and had a peak summer season in which it significantly expanded its work force. In an unpublished Order denying review of the Regional Director's Decision to include the peak season employees in the unit, the Board stated that where an employer "operates year-round with peak seasons, those hired for the peak season are properly characterized as 'seasonal employees.'" The Board then applied the factors set forth herein for assessing those employees' expectation of future employment.

torn down, and the Bear Creek Mountain Resort was built on the same site. Bear Creek opened in December 2004 and is now a year-round resort consisting of a 53-room hotel with a ballroom, ski shop, ski school, restaurant, and café. The Employer only operates the restaurant, café, and catering operations. Once Bear Creek opened as a year-round resort, the Employer began to operate its restaurant and catering facilities all year, but the café remains in operation only during the peak winter ski season. The restaurant seats 470 customers. During peak season, the restaurant is open seven days a week, while in the off-season it is only open Thursdays through Sundays.⁶ During the summer, the Employer provides catering services nearly every weekend.

The number of employees employed by the Employer fluctuates based on the time of year and the climate. The peak ski season is generally from mid-December until March, but if the weather is warm the beginning of the peak season will be delayed.⁷ The upcoming 2005-2006 winter season will be the first time the Employer hires peak season employees after having become a year-round operation. The Employer's General Manager, Franco Brady, began working at Bear Creek in December 2004.

To hire employees for the winter, in October the Employer places advertisements in two area newspapers, the *Allentown Call* and the *Reading Eagle*. Allentown, which is in Lehigh County 9 miles from Macungie, has a population of 106,632. Reading, which is in Berks County 30 miles from Macungie, has a population of 81,207. Lehigh County has a population of 312,090, while Berks County has a population of 373,638.⁸

In addition to advertising in the newspapers, Brady intends to recruit at an upcoming job fair and at a November 2005 orientation session. All employees of the Employer, as well as employees to whom the Employer has made offers of employment, are invited to attend the orientation session. At this event, Brady will ask employees to request their friends and former co-workers to apply to work for the Employer.⁹

Brady testified that about 50 percent of the year-round employees live within 10 miles of Bear Creek, while several others live within 20 miles. The record contained no evidence regarding commuting distances of seasonal employees.

At the end of the 2004 – 2005 peak season, the Employer placed a message in employees' paychecks inviting them to an end-of-season party at which the Employer awarded prizes that employees needed to be present to win. Brady testified that one of the purposes of the party was to encourage employees to apply to work for the Employer the following season. At the party, Brady thanked employees for a successful season and stated that he "was hoping that everybody would come back and we would continue this great performance."

⁶ In the off-season, the restaurant serves only about 25 to 75 customers per day.

⁷ In this connection, the temperature must remain below 28 degrees Fahrenheit for the resort to make artificial snow.

⁸ I take administrative notice of this data, which was derived from the Pennsylvania State Data Center, Pennsylvania's official source of demographic information.

⁹ The Employer plans to notify employees of the orientation session by placing a message in their paychecks.

Each applicant for work is required to complete a job application. The application asks if the employee has ever worked for the Employer and, if so, when and at what location. Brady reviews the applications and gives preference to the applications of employees who have previous work experience with the Employer or with another entity.

Seasonal employees are told that they are only hired for the ski season. If they seek to return in subsequent years, they need to reapply. Six employees who were hired as seasonal employees for the 2004 – 2005 season remained employed as part-time and on-call employees and worked throughout the spring and summer of 2005.¹⁰

Seasonal employees are hired for all of the Employer's positions. Employee pay rates depend on their experience and duration of employment with the Employer.¹¹ All employees, whether year-round or seasonal, wear the same uniforms while on duty. Likewise, all employees are entitled to free meals, and they eat together in the same location. Only full-time year-round employees are eligible for health benefits and vacation pay.

During the off-season, the Employer has two supervisors, and additional supervisors are hired for the winter months. The café is supervised exclusively by a seasonal supervisor, but in all other departments seasonal and year-round employees share common supervision.

During the 2003 – 2004 peak season, the Employer employed an average of 3 employees in November, 15 in December, 29 in January, 40 in February, and 11 in March. During the off-season, when the facility was rebuilding, the Employer had no employees in April, 3 employees in May, no employees in June, July, or August, 1 employee in September, and no employees in October. During the 2004 – 2005 peak season, the Employer employed an average of 13 employees in November, 67 in December, 85 in January, 78 in February, and 72 in March. Since then, the Employer employed an average of 40 employees in April, 40 in May, 30 in June, and 40 in July.

Of the approximately 40 seasonal employees from the 2003 – 2004 peak season, 25 (63 percent) returned for the 2004 – 2005 peak season.¹² For the 2004 – 2005 peak season, 41 percent of the Employer's average employee complement during the peak season had been rehired from the previous peak season. As of September 14, 2005, the date of the hearing in this matter, the Employer did not know how many seasonal employees it would need for the 2005 – 2006 peak season.

¹⁰ There were six employees who were hired in the 2003 – 2004 season and rehired for the 2004 – 2005 season who remained employed after that season ended; Taylor Angel, Dana Puzio, Christie Diehl, Michelle Virus, Barbara Burkhard, and Ashley Cain-Borgman. The record does not show whether these six were rehired as seasonal employees or as full-time employees.

¹¹ Brady also testified that there were different rates of pay for seasonal and year-round dishwashers.

¹² Not all of these employees remained employed for the entire 2004 – 2005 season. Several employees left in December and January.

III. ANALYSIS

A. Application of the factors for determining the eligibility of seasonal employees

In determining whether the Employer's peak season employees have an expectation of reemployment in future years, the following factors require analysis:¹³

Size of the Recruitment Area Labor Pool

The Employer places advertisements for peak season employees in newspapers in Allentown and Reading, Pennsylvania. This area includes several hundreds of thousands of people. The Employer also asks current employees to return in upcoming years and to encourage their friends to apply, and half of its year-round employees come from within a 10-mile radius of Bear Creek. Thus, on balance this factor neither favors nor disfavors a determination that seasonal employees have a reasonable expectation of future employment. See *Maine Apple Growers*, 254 NLRB 501, 502–503 (1984); *United Telecontrol Electronics*, 239 NLRB 1057 fn. 3 (1978); *P.G. Gray*, 128 NLRB 1026 (1960).

The Employer's Labor Requirements and Dependency on Seasonal Labor

The Employer's demand for seasonal labor in the winter months is consistent, definite, and sizeable. Each year, because the café is open only during the peak season and there is a considerable increase in the number of patrons in the restaurant during that period, the Employer needs to hire a large seasonal work force. This factor therefore supports a conclusion that the seasonal employees have a reasonable expectation of future employment. See *California Vegetable Concentrates, Inc.*, 137 NLRB 1779 (1962).

Actual Season-to-Season Reemployment

The Employer's reemployment of peak season employees in subsequent years is significant. About 63 percent of the seasonal employees hired for the 2003 - 2004 peak season were rehired for the 2004 – 2005 peak season. About 41 percent of the Employer's average complement during the peak season were rehires from the previous year's peak season. Therefore, this factor supports a conclusion that the seasonal employees have a reasonable expectation of future employment. *Millbrook Inc.*, 204 NLRB 1148, 1149 (1973); *Kelly Brothers Nurseries, Inc.* 140 NLRB 82, 85-86 (1962); *California Vegetable Concentrates*, supra.

¹³ The Petitioner contends that the Employer's operations are not seasonal because the Employer operates essentially on a year-round basis. The record is clear, however, that the Employer's year-round operation is punctuated by one significant peak season in which its employee complement grows significantly, and the Board has characterized such businesses as seasonal. *Diamond Walnut Growers*, 316 NLRB 36 (1995), enforcement denied on other grounds, 80 F. 3rd 485 (D.C. Cir. 1996); *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978).

The Employer's Recall and Preference Policies

The Employer asks on its employment application whether the applicant has experience working for the Employer, and the Employer has expressed a clear preference for rehiring former employees. The Employer requests its employees each fall to recruit former co-workers to return for the upcoming season, and at the end of the peak season the Employer encourages seasonal employees to return the following year. This factor therefore supports a finding that the seasonal employees have a reasonable expectation of future employment. See *Millbrook, Inc.*, supra; *Baumer Foods, Inc.*, 190 NLRB 690 (1971). The fact that some seasonal employees convert to year-round status supports a finding that seasonal employees share a community of interest with year-round employees, and it is therefore appropriate to include seasonal and year-round employees in the same unit. *California Vegetable Concentrates*, supra.

B. Summary

Three of the four factors used to determine the status of seasonal employees favor a finding that these employees have a reasonable expectation of recall, and the remaining factor, size of the recruiting area, is inconclusive. The Employer has a consistent need for seasonal employees each year, maintains a policy of rehiring seasonal employees from year to year, and actually rehired a substantial number of the previous year's seasonal employees for the 2004 - 2005 season. Based on these factors, I find that the Employer's seasonal employees have a reasonable expectation of employment from year to year, and I shall include the seasonal employees in the unit. See *Millbrook, Inc.*, supra; *Kelly Brothers Nurseries*, supra.

C. Scheduling of Election

Because the Employer's employee contingent essentially doubles during the peak season, I will follow the usual Board practice and direct that the election be held at or about the approximate seasonal peak during the 2005 – 2006 ski season. *NLRB v. Broyhill Company*, 528 F.2nd 719, 722 (1975); *Millbrook, Inc.*, supra; *Kelly Brothers Nurseries*, supra; *California Vegetable Concentrates, Inc.*, supra; *Camp & Felder Compress Co.*, 121 NLRB 871, 872 (1958). Cf. *Bituma Corp. v. NLRB*, 23 F.3rd 1432 (8th Cir. 1994).

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:¹⁴

All full-time, regular part-time and seasonal Banquet employees, Bartenders, Buspersons, Cashiers, Catering employees, Concessions employees, Cooks, Food employees, Hosts, Line Cooks, Prep Cooks, Runners, Warehouse employee, and Food Servers, **excluding** all office clerical employees, guards, and supervisors as defined by the Act.

If the Petitioner seeks to proceed to an election in the unit set forth above, its showing of interest may now be inadequate because as a result of this Decision, the seasonal employees are included in the unit. Accordingly, the Petitioner should advise the undersigned Regional Director as to whether or not it wishes to proceed to an election in the unit found appropriate, and the Petitioner has 14 days from the issuance of this Decision to augment its showing of interest, if necessary. See *NLRB Casehandling Manual (Part Two), Representation Proceedings*, Section 11031.2. If an increased showing of interest is necessary and the Petitioner fails to submit an adequate showing of interest within this period, or to withdraw the petition, the petition will be dismissed without further order. The Direction of Election set forth below is thus conditioned on the Petitioner having an adequate showing of interest. See *Alamo Rent-A-Car*, 330 NLRB 897 (2000). In the event that a request for review is filed with respect to this Decision, the foregoing requirement will be suspended until the Board rules on the request for review.

V. DIRECTION OF ELECTION¹⁵

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **United Food and Commercial Workers, Local 56**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

¹⁴ The petition, as amended at the hearing, included four classifications: Bartender, Server, Cook and Dishwasher, but the Petitioner stated at the hearing that it sought a "standard restaurant unit." As the record shows that the Employer's activities at Bear Creek are confined to restaurant and catering operations, I shall include all of its non-supervisory classifications in the unit.

¹⁵ The eligibility date for the election shall be the payroll period immediately preceding the date on which the Notice of Election issues.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in employee at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the issuance of the Notice of Election, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **October 21, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597–

7658, or by e-mail to Region4@NLRB.gov.¹⁶ Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an Employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops Employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EDT on **October 28, 2005**.

Signed: October 14, 2005

at Philadelphia, Pennsylvania

/s/ [Dorothy L. Moore-Duncan]

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

¹⁶ See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlr.gov.